

C A M P A I G N F O R ACCOUNTABILITY

November 8, 2017

By email: FOIARequest@hhs.gov

Michael Marquis
Freedom of Information Officer
Department of Health and Human Services
Hubert H. Humphrey Building, Room 729H
200 Independence Avenue, SW
Washington, DC 20201

Re: Freedom of Information Request

Dear Mr. Marquis:

Campaign for Accountability (“CfA”) makes this request for records pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. §§ 552, et seq., and Department of Health and Human Services (“HHS”) implementing regulations, 45 C.F.R. Part 5.

Specifically, CfA requests that HHS produce the following within 20 business days:

1. All communications, meeting notices, meeting agendas, informational materials, draft legislation, talking points, or other materials received by HHS from, sent by HHS to, or exchanged between HHS and representatives of the Susan B. Anthony List, Concerned Women for America, March for Life, American Values, and Family Research Council regarding House Resolution 1628 or any other efforts to repeal or reform the Affordable Care Act (“ACA”).
2. All calendar entries reflecting meetings between HHS and representatives of the Susan B. Anthony List, Concerned Women for America, March for Life, American Values, and Family Research Council regarding House Resolution 1628 or any other efforts to repeal or reform the ACA.
3. All communications, meeting notices, meeting agendas, informational materials, draft legislation, talking points, or other materials received by HHS from, sent by HHS to, or exchanged between HHS and representatives of the Susan B. Anthony List, Concerned Women for America, March for Life, American Values, and Family Research Council regarding House Joint Resolution 43 or any other efforts to exclude Planned Parenthood or similar organizations from federal funding.
4. All calendar entries reflecting meetings between HHS and representatives of the Susan B. Anthony List, Concerned Women for America, March for Life, American Values, and Family Research Council regarding House Joint Resolution 43 or any other efforts to exclude Planned Parenthood or similar organizations from federal funding.

Please provide all responsive records from January 20, 2017 to the date the search is conducted.

By way of background, opponents of the ACA began discussing ways to repeal and replace it before the ink even dried on the bill.¹ After the 2016 election, in which the Republican Party gained control of the White House and both chambers of Congress, plans for a replacement began to solidify. The American Health Care Act of 2017 was introduced in the U.S. Congress on March 6, 2017.² The House successfully passed the legislation on May 4, 2017,³ but it failed a full Senate vote on July 28, 2017.⁴ The legislation took five forms during that time, and each varied significantly in its treatment of the individual mandate, pre-existing conditions, essential health benefits, and other critical provisions. In all but one iteration, though, the legislation maintained its negative treatment of Planned Parenthood, promising to withhold Medicaid reimbursements to the organization for a one-year period. Four of the five versions of the bill included this provision despite the Congressional Budget Office's warning that it would result in the loss of access to reproductive healthcare services for 15 percent of people living in areas without other health care clinics who serve low-income populations.⁵ Though the legislation nearly collapsed following the Senate floor vote, work continues in the ongoing broader attempt to repeal and/or replace the ACA.⁶

Meanwhile, Congress and the administration did achieve some success in stripping funding from Planned Parenthood by other means. On April 13, 2017, President Trump signed House Joint Resolution 43, nullifying an HHS rule that prohibited states from denying Title X funds to Planned Parenthood and other abortion providers.⁷ Notably, Marjorie Dannenfelser, president of the Susan B. Anthony List, and Penny Nance, president of Concerned Women for America, attended the bill signing. Indeed, the Susan B. Anthony List, Concerned Women for America, March for Life, American Values, and Family Research Council have expended significant resources to strip Planned Parenthood of any federal funding throughout the years, and have worked closely with this Congress and administration on health care reform efforts. With the exception of March for Life, each organization joined the "Pro-Life Coalition" in support of the

¹ Ed O'Keefe, The House has voted 54 times in four years on Obamacare. Here's the full list., *The Washington Post*, March 21, 2014, available at <https://www.washingtonpost.com/news/the-fix/wp/2014/03/21/the-house-has-voted-54-times-in-four-years-on-obamacare-heres-the-full-list/>.

² Press Release, Office of the Speaker of the House Paul Ryan, 115th Congress, Statement on Introduction of the American Health Care Act, March 6, 2017, available at <https://www.speaker.gov/press-release/statement-introduction-american-health-care-act>.

³ Rachel Leah, American Health Care Act passes the House, but its future is still uncertain, *Salon*, May 4, 2017, available at <http://www.salon.com/2017/05/04/american-health-care-act-passes-the-house-but-its-future-is-still-uncertain/>.

⁴ Juliet Eilperin, Sean Sullivan, and Kelsey Snell, Senate rejects measure to partly repeal Affordable Care Act, dealing GOP leaders a major setback, *The Washington Post*, July 27, 2017, available at https://www.washingtonpost.com/powerpost/senate-gop-leaders-work-to-round-up-votes-for-modest-health-care-overhaul/2017/07/27/ac08fc40-72b7-11e7-8839-ec48ec4cae25_story.html.

⁵ Congressional Budget Office, 115th Congress, *Cost Estimate of the American Health Care Act*, March 13, 2017, available at <https://www.cbo.gov/sites/default/files/115th-congress-2017-2018/costestimate/americanhealthcareact.pdf>.

⁶ Dylan Scott, Republicans wind up one last Hail Mary to repeal Obamacare, *Vox*, Sept. 13, 2017, available at <https://www.vox.com/policy-and-politics/2017/9/12/16290424/obamacare-repeal-cassidy-graham-can-it-pass>.

⁷ Jessie Hellmann, Trump signs bill targeting funding for abortion providers, *The Hill*, April 13, 2017, available at <http://thehill.com/policy/healthcare/328674-trump-signs-bill-targeting-planned-parenthood-funding>.

Trump-Pence ticket, based largely on Trump's commitment to defund Planned Parenthood.⁸ Vice President Pence has frequently relied on the leaders of Concerned Women for America, March for Life, and the Susan B. Anthony List to aid in efforts to push the health care bill through Congress.⁹ The public deserves the opportunity to determine whether and to what extent these organizations have attempted to influence HHS as it counsels the administration and Congress on health care reform and on the future of funding for Planned Parenthood, both matters of paramount public concern. The requested records would give the public that opportunity.

In addition to the records requested above, please provide records reflecting the processing of this request, including any tracking sheets; records sufficient to identify search terms used, and locations and custodians searched. If your agency uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they conducted searches, we also request any such records prepared in connection with the processing of this request.

CfA seeks all responsive records regardless of format, medium, or physical characteristics. In conducting your search, please understand the terms "record," "document," and "information" in their broadest sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs, as well as letters, emails, facsimiles, telephone messages, voice mail messages and transcripts, notes, or minutes of any meetings, telephone conversations or discussions. Our request includes any attachments to these records. No category of material should be omitted from search, collection, and production.

Please search all records regarding agency business. Please do not exclude searches of files or emails in the personal custody of agency officials, such as personal email accounts. Records of official business conducted using unofficial systems or stored outside of official files is subject to the Federal Records Act and FOIA.¹⁰ It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; CfA has a right to access those files even if they have not yet been moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations.¹¹

⁸ Press Release, The Susan B. Anthony List, Trump Campaign Announces National Co-Chairs of Pro-Life Coalition, Sept. 27, 2016, available at <https://www.sba-list.org/newsroom/press-releases/trump-campaign-announces-national-co-chairs-pro-life-coalition>.

⁹ Mike DeBonis and John Wagner, Republicans try to revive health-care effort as leaders seek to temper expectations, *The Washington Post*, April 4, 2017, available at https://www.washingtonpost.com/powerpost/with-help-from-pence-house-republicans-suddenly-rekindle-health-care-talks/2017/04/04/91cf1c74-192f-11e7-855e-4824bbb5d748_story.html?utm_term=.133f53e25e6a; Christine Grimaldi, Mike Pence Had a Meeting With Anti-Choice Activists He Doesn't Want You to Know About, *Rewire*, July 11, 2017, available at <https://rewire.news/article/2017/07/11/mike-pence-meeting-anti-choice-activists-doesnt-want-know/>.

¹⁰ See *Competitive Enterprise Institute v. Office of Science & Tech. Policy*, 827 F.3d 145, 149—150 (D.C. Cir. 2016); cf. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955—956 (D.C. Cir. 2016).

¹¹ See *Competitive Enterprise Institute v. Office of Science & Tech. Policy*, ___, slip op. at 8 (D.D.C. Dec. 12, 2016) ("The Government argues that because the agency had a policy requiring [the official] to forward all of his emails from his [personal] account to his business email, the [personal] account only contains duplicate agency records at best. Therefore, the Government claims that any hypothetical deletion of the [personal account] emails would still

In addition, please note that in conducting a “reasonable search” as required by law, HHS must employ the most up-to-date technologies and tools available, in addition to searches by individual custodians likely to have responsive information. Recent technology may have rendered HHS’s prior FOIA practices unreasonable. In light of the government-wide requirements to manage information electronically by the end of 2016, it is no longer reasonable to rely exclusively on custodian-driven searches.¹² Furthermore, agencies that have adopted the National Archives and Records Agency (NARA) Capstone program, or similar policies, now maintain emails in a form that is reasonably likely to be more complete than individual custodians’ files. For example, a custodian may have deleted a responsive email from his or her email program, but HHS’s archiving tools would capture that email under Capstone. Accordingly, CfA insists that HHS use the most up-to-date technologies to search for responsive information and take steps to ensure that the most complete repositories of information are searched. CfA is available to work with HHS to craft appropriate search terms. However, custodian searches are still required; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.

Under the FOIA Improvement Act of 2016, agencies must adopt a presumption of disclosure, withholding information “only if . . . disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.”¹³ If it is your position that any portion of the requested records is exempt from disclosure, CfA requests that you provide an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). As you are aware, a *Vaughn* index must describe each document claimed as exempt with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA.”¹⁴ Moreover, the *Vaughn* index “must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing the sought-after information.”¹⁵ Further, “the withholding agency must supply ‘a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.’”¹⁶

In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If it is your position that a document contains non-exempt segments, but that those non-exempt segments are

leave a copy of those records intact in [the official’s] work email. However, policies are rarely followed to perfection by anyone. At this stage of the case, the Court cannot assume that each and every work-related email in the [personal] account was duplicated in [the official’s] work email account.” (citations omitted)).

¹² Presidential Memorandum – Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), *available at* <https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records>; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), *available at* <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

¹³ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114–185).

¹⁴ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

¹⁵ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

¹⁶ *Id.* at 224 (citing *Mead Data Central, Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)).

so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document.¹⁷ Claims of nonsegregability must be made with the same degree of detail as required for claims of exemptions in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

To ensure that this request is properly construed, that searches are conducted in an adequate but efficient manner, and that extraneous costs are not incurred, CfA welcomes an opportunity to discuss its request with HHS before you undertake your search or incur search or duplication costs. By working together at the outset, CfA and HHS can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in electronic format via email at koconnor@campaignforaccountability.org. Alternatively, our mailing address is Campaign for Accountability, 611 Pennsylvania Avenue SE, #337, Washington DC 20003. If it will accelerate the release, please also provide responsive material on rolling basis.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 45 C.F.R. § 5.54, CfA requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute significantly to a better understanding of relevant government procedures by the general public. Moreover, the request is primarily and fundamentally for non-commercial purposes. 5 U.S.C. § 552(a)(4)(A)(iii).¹⁸

CfA requests a waiver of fees because disclosure of the requested information is in the public interest because it is “likely to contribute significantly to public understanding of the operations or activities of the government.”¹⁹ The disclosure of the information sought under this request will document and reveal the operations of the federal government, including how officials conduct the public’s business.

As noted above, the organizations whose communications with HHS are the subject of this request have played significant roles in supporting this administration and Congress’s efforts to repeal or reform the ACA. They have also committed extensive resources to efforts to defund Planned Parenthood. The records CfA seeks will help the public understand whose interests are being considered as the administration and Congress make decisions that have a profound impact on people’s lives.

This request is primarily and fundamentally for non-commercial purposes. As a 501(c)(3) organization, CfA does not have a commercial purpose and the release of the information requested is not in CfA’s financial interest. CfA is committed to protecting the public’s right to

¹⁷ *Mead Data Central*, 566 F.2d at 261.

¹⁸ See, e.g., *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

¹⁹ 45 C.F.R. § 5.54(a).

be aware of the activities of government officials and to ensuring the integrity of those officials. CfA uses a combination of research, litigation, and advocacy to advance its mission. CfA will analyze the information responsive to this request, and will share its analysis with the public, either through memoranda, reports, or press releases. In addition, CfA will disseminate any documents it acquires from this request to the public through its website, www.campaignforaccountability.org.

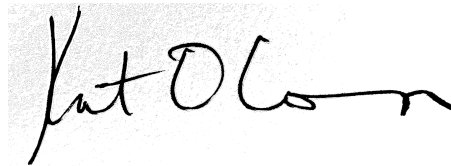
Accordingly, CfA qualifies for a fee waiver.

Conclusion

CfA looks forward to working with HHS on this request. If you do not understand any part of this request, have any questions, or foresee any problems in fully releasing the requested records, please contact me at 202-780-5750. Further, if CfA's request for a fee waiver is not granted in full, please contact me immediately upon making such a determination.

Thank you for your assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Katie O'Connor", is written over a light gray rectangular background.

Katie O'Connor
Legal Counsel